No. 20236

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES RUBBER COMPANY,

Appellant,

v.

FRANCIS WRIGHT and MATT S. HUGHES, Trustee in Bankruptcy for Hank Wright's Sons, Inc., a corporation, and MATT S. HUGHES, Trustee in Bankruptcy for Francis Wright,

Appellees.

APPELLEES' ANSWERING BRIEF

Appeal from the United States District Court for the District of Oregon

HON. WILLIAM G. EAST, Judge

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STATEMENT OF JURISDICTION

On September 10, 1962, plaintiffs, Francis Wright, a citizen of Oregon, and Hank Wright's Sons, Inc., an Oregon corporation, filed a civil action against the appellant United States Rubber Company, a New Jersey Corporation, with its principal place of business in the

State of New York. The amount in controversy exceeds $10,000 (R. 9, 10). Jurisdiction of the district court was based on 28 U.S.C. 1332.

After pre-trial proceedings in which appellant refused to admit any facts except those material to its counterclaims, the incorporation or citizenship of the parties, and the appointment of Matt S. Hughes as Trustee (R. 10, 11), a Pre-Trial Order was signed by the parties and approved by the court (R. 9-29, inclusive). Thereafter appellant filed a motion labelled "Motion for Summary Judgment" in which it urged that the plaintiffs' contentions do not state a claim upon which relief can be granted. This motion was finally denied by Order dated July 7, 1965 (R. 40-41).

It is from this Order that appellant prosecutes its appeal under Title 28 U.S.C., Section 1292 (b). The lower court found that the order involved a controlling question of law as to which there exists a substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation (R. 41). This Court granted leave to file the immediate appeal.

STATEMENT OF THE CASE

Appellant's statement of the case is accurate though somewhat confusing. This case was brought by the original plaintiffs to recover damages for breach of an agreement to finance appellee, Francis (Hank) Wright, as a dealer for U. S. Rubber (R. 13-18, Contentions 2-16, inclusive).

The actual dealership was to be in the name of the corporation formed by Wright, Hank Wright Sons, Inc., and such corporation was the other plaintiff in the initial complaint.

The plaintiff corporation filed voluntary bankruptcy proceedings in June, 1963 (R. 10) and the plaintiff Francis Wright, individually, filed a petition to be declared a bankrupt in October, 1964 (R. 10, Contention 10). In each proceeding the Trustee was authorized to continue the pending litigation and was joined or substituted herein as plaintiff.

The plaintiff, Francis Wright, individually, is seeking damages for injury to his credit (R. 19, Contention 25). The plaintiff Hughes, as Trustee for Hank Wright's Sons, Inc., the corporation, is seeking damages in the amount of $94,000 representing its expenses incurred in fulfilling its contractual obligations (R. 19, Contention 20, 23). The Trustee for Francis Wright is seeking damages for $79,500 less $51,000 representing a personal guarantee of the corporation debts by the plaintiff Francis Wright (R. 18, Contention 19; R. 19, Contention 24), or a net claim of $28,500 broken down in Contention 19, R. 18, as $25,000 for sums spent by the plaintiff in performing his contract with defendant and $3,500 for the reasonable value of his labor in performing his part of the agreements with appellant.

No claim is made by any plaintiff for loss of profits.

Appellant made thirteen (13) contentions, the last three (3) of which are urged here, namely, that the appellees' contentions do not state a claim upon which relief can be granted.

SUMMARY OF ARGUMENT

Appellant has assigned four specifications of error which we will answer in sequence.

1. SPECIFICATION OF ERROR 1. Appellees' contentions (R. 12-19) state claims in favor of Francis Wright upon which relief can be granted:

(a) A breach of contract was alleged (Contention 17, R. 18).

(b) There can be a recovery for damage to credit and impairment of standing in the community. Such damages are reasonably foreseeable and within the contemplation of the parties.

Coffey v. *Northwestern Hospital Assn.,* 96 Or. 100, 183 Pac. 762, 189 Pac. 407 (1919).

Hinish v. *Meier & Frank Co.,* 166 Or. 482, 112 P.2d 438 (1941).

Merchants Bank of Canada v. *Sims,* 122 Wash. 106, 209 Pac. 1113 (1922).

Quillen v. *Schimpf,* 133 Or. 581, 291 Pac. 1009 (1930).

Westesen v. *Olathe State Bank,* 78 Colo. 217, 240 Pac. 689, 44 A.L.R. 1484 (1925).

Restatement *Contracts,* §§ 343, 330.

Sutherland on *Damages,* Vol. III, § 980, 4th Ed. (1916).

Cf. *Dalton* v. *Waggoner,* 30 S.W.2d 665 (Texas, 1930).

(c) Title to such claim remains in the individual plaintiff since it affects his future earning capacity, and his future standing in the community.

Boudreau v. *Chesley,* 135 F.2d 623 (1st Cir., 1943).

See also, Annot., 66 A.L.R.2d 1217, at 1219 (1959).

(d) The contract was not so indefinite and uncertain as to be unenforceable as a matter of law.

Merchants Bank of Canada v. *Sims,* 122 Wash. 106, 209 Pac. 1113 (1922).

2. SPECIFICATION OF ERROR 2. The Trustee's claim for Francis Wright states a claim upon which relief can be granted, in the following particulars:

(a) It *does* allege a breach (same point as in answer to specification 1 (a) supra) (See R. 18, Contention 17).

(b) The promise was not so indefinite and uncertain *as a matter of law* that the claim should be dismissed (same argument as under specification 1 (d) supra).

Goodman et al v. *Dicker et al,* 169 F.2d 684 (D.C.C.A., 1948).

American Can v. *Garnett,* 279 Fed. 722 (9th Cir., 1922).

3. SPECIFICATION OF ERROR 3. The claim for the Trustee, on behalf of Hank Wright's Sons, Inc., the corporation, is not unenforceable as a matter of law because of indefiniteness and uncertainty:

(a) The contentions set forth the essential elements of the contract and the degree of definiteness is a matter of evidence. This Court does not have before it any of the exhibits identified at the time of the pre-trial and reserved by the Pre-Trial Order (R. 23).

(b) Assuming, however, that this is not a question of evidence, contracts such as the one alleged in appellee's contentions (R. 14, Contentions 9, 11, 12, 14, 15) *are* enforceable.

Allied Equipment Co. v. *Weber Engineered Prod. Inc.,* 237 F.2d 879 (4th Cir., 1956).

Commercial Security Bank v. *Hodson,* 15 Utah 2d 388, 393 P.2d 482 (1964).

Howland v. *Iron Fireman Mfg. Co.,* 188 Or. 230, 213 P.2d 177, 215 P.2d 380 (1950).

Hunt Foods v. Phillips, 248 F.2d 23, at 30 (9th Cir., 1957).

Marrinan Medical Supply v. *Fort Dodge Serum Co.,* 47 F.2d 458 (8th Cir., 1931).

J. C. Millett Co. v. *Park & Tilford Distillers Corp.,* 123 F. Supp. 484 (N.D. Cal. S.D., 1954).

Corbin on *Contracts,* Vol. 1A, Sec. 155, p. 26 et seq (1963).

See also, Annot., 17 A.L.R.2d 1300 (1951).

4. Specification of Error 4. The contract of December 26, 1961, was neither void nor superseded:

(a) The contract between Hank Wright's Sons, Inc. and appellant was not void for lack of mutuality. It was a bilateral contract. It is for the trier of fact to determine whether or not Hank Wright's Sons, Inc. was obligated to maintain an inventory, warehouse, retreading facilities, a sales organization to meet the demands of the market, etc. Generally a distributorship contract is more than a mere agency agreement.

Des Moines Blue Ribbon Distributors, Inc. v. *Drewrys Ltd. U.S.A., Inc.,* 129 N.W.2d 731 (Iowa, 1964).

C. C. Hauff Hardware v. *Long Mfg. Co.,* 136 N.W.2d 276 (Iowa, 1965).

Hunt Foods Inc. v. *Phillips,* 248 F.2d 23 (9th Cir., 1957).

Jack's Cookie Company v. *Brooks,* 227 F.2d 935 (4th Cir., 1955).

J. C. Millett v. *Park Tilford Distillers Corp.,* 123 F. Supp. 484 (N.D., Cal. S.D., 1954).

Corbin on *Contracts,* Vol. 1 A, Sec. 152, p. 4 (1963).

(b) The December 26, 1961, agreement was not superseded by Exhibit A, the consignment agreement dated December 27, 1961 (R. 24-28). The December 26, 1961, agreement (Appellees' Contentions 14, 15; R. 15-18) was an agreement between the parties, partly oral, partly written, partly evidenced by forecasts, and confirmed by correspondence.

The "consignment agreement" had nothing to do with the financing, assisting in advertising, making payroll payments, etc., and by its terms (R. 28, Clause 25) only superseded agreements on the subject of the furnishing, selling or consignment of tire merchandise. Exhibit "A" (R. 24-28), a printed form prepared by appellant, in paragraphs 12 and 20, does not purport to list the exclusive agreement but each paragraph states that the parties "shall *among other things*:" (Emphasis added). Appellees contend it is immaterial whether Exhibit "A" was signed before or after the main agreement was reached. Exhibit "A" governs the details of the consignment of merchandise; the contract summarized in appellees' contentions delineated the responsibilities of the parties as manufacturer and distributor or dealer.

ARGUMENT

1. Specification of Error No. 1

(a) Appellant first argues that there is no allegation of a breach of the contract between appellant and Hank Wright personally. In the Pre-Trial Order, appellant made no such specific contention (R. 20-22) although, of course, it can be argued under Defendant's Contention 11 (R. 22), that the plaintiffs' contentions failed to state a claim against defendant upon which relief can be granted to Francis Wright. We mention this because, had the writer any idea that appellant would seriously be arguing this question before the Court of Appeals, the language would have been more artfully phrased. It is respectfully submitted, however, that appellant is not misled and the contentions do allege such a breach. We respectfully submit that the following language, taken from Plaintiffs' Contention 7 (R. 14) and Plaintiffs' Contention 17 (R. 18), is a fair and succinct summation of plaintiffs' contentions and that there is nothing obscure or hidden about plaintiffs' position:

> "7. . . . defendant entered into an agreement with Francis Wright that it would, . . . enter into a subsequent contract with a corporation to be formed by Francis Wright by the terms of which contract it would extend credit, marketing advantages, and loans sufficient to finance the proposed business. . . ."
>
> "17. . . . about January 23, 1962, in breach of the contract of December 26, 1961, with Hank Wright's Sons, Inc., the defendant stopped Hank

> Wright's Sons, Inc. line of credit, refused to furnish the first $10,000 cash due under said contract, ceased the other benefits . . . and demanded an additional personal guarantor . . . That Francis Wright and Hank Wright's Sons, Inc., . . . offered to furnish the additional $5,000 guarantor but defendant still refused to continue to operate under the terms of its contract *with the plaintiff Francis Wright* and the plaintiff Hank Wright's Sons, Inc. and the defendant has refused to comply with said contract since said time except for a brief period in February, 1962, during which time limited credit was extended to Hank Wright's Sons, Inc." (Emphasis added)

The plaintiff appellee, Francis Wright, was not interested in merely a contract to extend certain advantages to the corporation he and his sons were to form. He was interested in the advantages and the performance of the contract. Since the corporation had not yet been formed, the proposal was made to Mr. Wright personally. The purpose of stating plaintiffs' contentions is not to outline or delineate all of plaintiff's evidence, but on the contrary to advise the defendant and the Court of the nature of plaintiffs' claim that was based on breach of contract and the nature of the breach. It is respectfully submitted that the contentions meet this test.

It is obvious from their allegations (Contention 17, R. 18) that plaintiffs viewed both agreements as one transaction, i.e., "defendant still refused to continue to operate under the terms of its said *contract* with the plaintiff Francis Wright and the plaintiff Hank Wright's Sons, Inc. We assume that if the word "contract" were

plural, appellant would not object. Likewise, if, in plaintiffs' Contention 7 (R. 14), we had stated "that defendant entered into an agreement with Francis Wright that it would . . . enter into a subsequent contract with a corporation to be formed by Francis Wright" *and pursuant to such contract it would "extend credit, marketing advantages,"* etc. (iltalicized material added), we assume appellant would be satisfied.

We respectfully submit that the allegation of Contention 7 that A agreed with B that it would contract with C to extend C credit, is the same as A promising B that it would extend credit to C. Appellant's argument may or may not be effective to a jury but it should be reserved until such time.

b. Can Francis Wright recover damages for injury to his credit and impairment of his standing in the community?

The Pre-Trial Order alleges (Plaintiffs' Contention 18, R. 18) that appellant's breach of its contract to furnish credit, etc., caused the corporation, Hank Wright's Sons, Inc., to fail. The Pre-Trial Order further contends (Plaintiffs' Contention 11, R. 15) that Francis Wright personally, *with full knowledge of defendant* (Emphasis added) obligated himself by guaranteeing contracts for the purchase of equipment, delivering his personal note, etc.

In Contention No. 12, it is alleged that the corporation, Hank Wright's Sons, Inc., had no credit standing, that appellant knew of such fact, that the corporation obtained credit only because of the credit of Francis

Wright and the promise of appellant to give financial assistance to the corporation. Therefore, when the appellant breached its contract to assist the corporation in its finances, it was reasonably foreseeable that this would not only have a deleterious effect on the corporation, which had no credit, but would also have an equally serious effect on the personal credit standing of Francis Wright (See the case of *Merchants Bank of Canada* v. *Sims,* 122 Wash. 106, 209 Pac. 1113 (1922), holding that loss of a plant and equipment and certain supplies was the reasonably expected result of a breach of a contract to extend credit to a fish cannery). In view of the allegations that the defendant had reason to know the facts and did know the facts at the time it breached the agreement, it is respectfully submitted that appellant had reason to foresee these damages.

In *Westensen* v. *Olathe State Bank,* 78 Colo. 217, 240 Pac. 689, 44 A.L.R. 14, 84 (1925), the Court allowed damages not only for "out-of-pocket" expenses but for humiliation and mental suffering resulting from the breach. Damages were awarded even though there was no showing that the breach was wilful, since the bank knew that it had agreed to loan the plaintiff money to finance his trip to California.

In *Hinish* v. *Meier & Frank,* 166 Or 482, 113 P.2d 438 (1941), the Oregon Supreme Court allowed a recovery for mental anguish for a violation of the right of privacy and states (166 Or. at 506):

> ". . . it is well settled that where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is the

direct, proximate and natural result of a wrongful act (citing cases). Violation of the right of privacy is a wrong of that character.

"The damages may be difficult of ascertainment, but not more so than in actions for malicious prosecution, breach of promise of marriage, or alienation of affections, and in many cases of libel, slander and assault. The law has never denied recovery to one entitled to damages simply because of uncertainty as to the extent of his injury and the amount which would properly compensate him."

In *Dalton* v. *Waggoner,* a Texas case (30 S.W.2d 665), the Court allowed out-of-pocket damages but did not allow damages for the loss of reputation or humiliation or standing to the plaintiff, an experienced banker. The Court found that no special circumstances existed, that the appellee had no knowledge of the special circumstances under which damage did occur, and that the contract was not based upon the special circumstances alleged as the predicate for such damages.

In the Oregon case of *Coffey* v. *Northwestern Hospital Assn.,* 96 Or. 100, 183 Pac. 362, Rehearing denied 189 Pac. 407), the court allowed a recovery for mental anguish resulting from the breach of a contract to furnish plaintiff medical and surgical services.

In *Quillen* v. *Schimpf,* 133 Or. 581, 291 Pac. 1009 (1930), the Oregon court states the then general rule that mental pain and suffering alone does not constitute a basis for the recovery of substantial damages, but recognized even then the exceptions to the rule in actions "for breach of contract of marriage, in certain cases a

wilful wrong, especially those affecting the liberty for personal security, character or reputation, or domestic relations . . . as the ordinary, natural and proximate consequences of the wrong complained of" (a tort case). The Oregon case also cites with approval *Sager* v. *Sisters of Mercy,* 81 Colo. 498, 256 Pac. 8, 56 A.L.R. 655 (1927), in which the court allowed a recovery for "mental pain and suffering" from a wilful tort as the natural and proximate consequence of a wrong. The Oregon Court also approves *Westesen* v. *Olathe State Bank* (133 Or. at 596).

c. Appellant argues (Appellant's Br. 25) that, in any event, title to the claim for damages for loss of credit, etc. would pass to the Trustee in Bankruptcy. Appellant correctly assumes that appellees would cite *Boudreau* v. *Chesley,* 135 F.2d 623 (1st Cir., 1943), for the reason that this case was cited to the Court below in support of our position.

It is true that in *Boudreau* the cause of action was alleged, in part, as a "malicious conspiracy" and charged making false representations, etc. in furtherance of such conspiracy. The question was squarely before the Court as to whether the proceeds from this cause of action recovered by the plaintiff bankrupt belonged to the Trustee or to the plaintiff bankrupt, and the Court in determining that it belonged to the bankrupt stated (at page 624):

> "The advantageous business relationship alleged to have been interfered with in the case at bar merely afforded . . . an opportunity to earn and acquire property in the future. The predominant injury

> charged in the declaration is the ruining of (the plaintiff's) reputation, whereby his future earning capacity has been practically destroyed. But creditors are not entitled to share in the distribution of the capitalized value of the bankrupt's future earning capacity. As was said in citing case 'the earning power of an individual is the power to create property; but it is not translated into property within the meaning of the bankruptcy act until it has brought earnings into existence.' "

Also, see a discussion of this general problem at 66 A.L.R.2d 1217, et seq. Appellant does not contend that this cause of action could have been reached by attachment by a creditor. It is respectfully submitted that the answer does not depend on the affixing of the label *ex contractu* or *ex delicto* but rather on whether or not the damage was to plaintiffs' future earning capacity or was past damage to his estate. In the present case, we submit that this injury is clearly an individual one affecting Francis Wright's future earning capacity and standing in the community, and there is nothing in the case to warrant passing it to the Trustee in Bankruptcy.

We should further observe that even if appellant is correct, this would not extinguish or satisfy the claim but would only require amendment of the Pre-Trial Order to assert this contention by the Trustee. We believe it is a matter to be settled between the Trustee and the individual plaintiff and should not concern the appellant so long as appellant is not subjected to a double recovery.

d. Nor was the alleged contract too indefinite and

uncertain to be enforced. Plaintiffs' Contention 8 (R. 14) clearly sets forth the conditions of the unilateral offer that had to be satisfied by the plaintiff Francis Wright. He was to procure certain property, arrange for construction of a building, etc. It is apparent from appellant's argument that they do not contend there is any indefiniteness or uncertainty in this respect. They then argue that plaintiffs' Contention 7 (R. 14) is too indefinite because it refers only to extending credit, marketing advantages, and loans sufficient to finance the proposed business "all as hereinafter set forth".

Commencing in Contention 14 (R. 15) plaintiff sets forth, in some 15 particulars, the details of extending credit, marketing advantages (furnishing one giant tire, service truck, assistance in bidding on road construction jobs, etc.) and loans sufficient to finance the proposed business ($40,000 operating capital, $200,000 line of credit, and special discounts). We find it difficult to argue this point with appellant because it seems so clear that this contention does not purport to set forth all of the evidence to be adduced on this point. On the contrary, it does give appellant specific notice of the agreements and details of the financing which plaintiff contended appellant was to furnish. It is true that plaintiffs' contention does not state that the $40,000 was to be furnished on (for example) the 30th day of operation, etc. On the other hand, we feel confident the evidence adduced from the forecasts made by appellant and produced from its records will supply complete specifics as to the details and manner in which this loan was to be advanced and, indeed, substantially all of the financing

to be accomplished. Again, we submit, this is a question for the trial court after having all of the evidence. In *Commercial Security Bank* v. *Hodson,* 15 Utah 2d 388, 393 P.2d 42 (1964) the Utah court held that the absence of all the details did not render an agreement illusory but presented a jury question.

2. Specification of Error No. 2

The appellant next urges (Appellant's Br. 31) that the contentions of Matt S. Hughes, Trustee for Francis Wright, fail to state a claim because there is no allegation that the appellant breached the contract entered into between Francis Wright and U. S. Rubber, and, secondly, that the contract between Francis Wright and U. S. Rubber was void for indefiniteness. Both of these points have been considered, supra, under Specification of Error No. 1 and there is nothing to be gained by repetition.

3. Specification of Error No. 3

Appellant contends that the claim of the Trustee on behalf of the corporation, Hank Wright's Sons, Inc., is unenforceable as a matter of law because: (a) it is indefinite and uncertain.

Before arguing, let the writer declare that it is his understanding that the purpose of stating plaintiffs' contentions in the Pre-Trial Order is to give a defendant notice of the nature of the contract upon which plaintiff relies, to advise him of plaintiff's theory of the case, and *not* to list all of the evidence expected to be adduced.

We are at a loss to understand how appellant expects this Court to rule the contract void for indefiniteness merely on the statement of the plaintiffs' contentions. For example, appellant objects (Appellant's Br. 34-35) that the contract was indefinite because of commencement and duration. No evidence has as yet been adduced as to the custom of the industry or as to what constitutes a reasonable time. Nor has the appellant's correspondence or plaintiff's deposition been received. These exhibits would spell out the specific territorial limits and outline the franchise rights, just as the appellant's forecasts will show exactly what was in the minds of each of the parties as to the nature and extent of the financing. The words "a giant tire service truck" have a definite meaning but this case is before this Court on a Pre-Trial Order prior to the hearing of any evidence, and it is respectfully submitted that the argument of appellant on this issue is beside the point.

Assuming, however, without conceding that the motion for summary judgment would properly raise the issue of indefiniteness and uncertainty, the Court has held that similar contracts were not void for this reason.

The appellant has cited four older cases on ths point: *Jordan* v. *Buick Motor Co.,* 75 F.2d 447 (7th Cir., 1935), and *Tamm* v. *Ford Motor Co.,* 80 F.2d 723 (8th Cir., 1935) both rely upon *Ford Motor Co.* v. *Kirkmyer Motor Co.,* 65 F.2d 1001 (4th Cir., 1933), for the proposition that contracts such as these are indefinite and uncertain as to terms and as a result are lacking in mutuality, and therefore void. However, the Fourth Circuit

in *Allied Equipment Co.* v. *Weber Engineered Products, Inc.*, 237 F.2d 879 (4th Cir., 1956), said:

> "It is perfectly true that generally speaking a distributorship arrangement such as this does not constitute the basis for suits on account of quantities, prices, terms, and such items; and, generally speaking, they are terminable by either of the parties. In the Kirkmyer case, for example, this court held that an oral promise of a dealership, in so far as it related to the sale of the manufacturer's products to the dealer, was lacking in mutuality and was too indefinite to form the basis for a binding obligation on the part of the manufacturer. In that case the dealer had a franchise and was located in West Richmond. The manufacturer wanted a dealer in South Richmond and told the dealer it must move or lose the franchise. The manufacturer also promised that if an additional dealership were placed in West Richmond this dealer would get it. The dealer moved, and later another concern was awarded a dealership in West Richmond. The franchise which the dealer had, and in respect to which he incurred the expense of moving, etc., was not cancelled. The basis of his suit was the failure to award him the other franchise, in respect to which he had made no expenditures. But that is not the problem in our case. Here we are faced with the claim of a distributor who is being deprived of the very franchise which he has built up, allegedly at great expense.
>
> "[2, 3] There is an exception to the general rule of which the Kirkmyer case is an expression. It is well settled that, where an employed agent, in reliance upon the agency and with the knowledge of his principal, expends funds in the interest of the

> agency and of the principal, the principal is committed to the agency for a reasonable period of time, so that the agent may thus recoup his expenditures."

Also, appellant cites *Chappell* v. *FAD Andrea, Inc.*, 41 Ga 413, 153 SE 218 (1930), as authority for its position. However, in the conclusion of that case, the court (p. 220) indicates it cannot determine *damages* because of uncertain terms. Perhaps, if the plaintiff in that case had sought recovery for cost of performance, the result would have been different.

Finally, appellant relies on *Curtiss Candy Co.* v. *Silberman,* 45 F.2d 451 (6th Cir., 1930). The *Curtiss* case was rejected by the Ninth Court of Appeals as authority that franchise cases such as these lack mutuality in *Hunt Foods* v. *Phillips,* 248 F.2d 23 (9th Cir., 1957), at page 30, because the court in the *Curtiss* case found only a series of separate and independent sales, each complete in itself.

On the general problem of certainty in these contracts, the Oregon court has expressed itself in *Howland* v. *Iron Fireman Mfr. Co.*, 188 Or 230, 213 P2d 177, 215 P.2d 380 (1950):

> "14, 15. Influenced by the realities of modern business practice, the courts manifest a tendency to uphold dealership contracts similar to the one asserted here as against attack on the grounds of indefiniteness or lack of mutuality. Moore v. Shell Oil Co., 139 Or 72, 6 P2d 216; Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc., 29 F2d 3; Jay Dreher Corporation v. Delco Appliance Corpo-

ration, Supra; Schnerb v. Caterpillar Tractor Co., supra; Falstaff Brewing Corp. v. Iowa Fruit & Produce Co., supra; Ken-Rad Corp. v. R. C. Bohannan, Inc., 80 F.2d 251; Beebe v. Columbia Axle Co., supra; Sargent v. Drew-English, Inc., 12 Wn. 2d 320, 121 P.2d 373; Nathan Elson & Co. v. H. Beselin & Son, supra; Kelly Springfield Tire Co. v. Bobo, supra; Abrams v. George E. Keith Co., 30 F.2d 90; Erskins v. Chevrolet Motors Co., supra; Western Beauty Supply Co. v. Duart Sales Co., 192 Okla. 6, 133 P.2d 202. The contract disclosed in the plaintiff's evidence is not in our opinion void for uncertainty or lack of mutuality." (p. 292)

Corbin on *Contracts,* Section 155, discusses this matter pointedly:

"Often a sales agency contract does not fix the amount of goods or the number of articles that the agent must take or sell. The exigencies of business often require that this must be left flexible, so that it may vary with general business conditions and with manufacturing needs and difficulties. Such a contract usually contains various subsidiary promises on both sides. Said subsidiary promises are sufficient consideration for any return promises, so that the contract should not be held void for lack of 'mutuality' promises by the agent to advertise and to promote sales with diligence and by the manufacturer to supply goods to any reasonable extent as ordered, or readily to be found by implication. These implied promises also are sufficient consideration and are not so indefinite or uncertain as to be unenforceable."

Marrinan Medical Supply v. *Fort Dodge Serum*

Company, 47 F.2d 458 (8th Cir., 1931). In this case the court considers extensively the problem of contracts that do not specifically set forth the particular amounts or particular efforts that are to be expended under the terms of the contract. It reviews the cases and finds mutuality in these situations and comments at page 462:

> "Contracts are usually entered into by businessmen with the purpose that they shall be performed, and there is an implied agreement that each party shall exercise good faith in trying to carry them out. Courts will take these elements into consderation in construing a contract."

Most of the cases reviewed by appellees under mutuality also discuss the certainty problem. For example, in *J. C. Millett* v. *Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. S.D., 1954), where time was not set, the court supplied an indefinite time; where notice of termination was not set, the court found a reasonable notice. As to quantity, the court said:

> "[3] The agreement is not fatally uncertain as to quantity. Bearing in mind the object of the contract—to promote the sale of Park & Tilford products—it is difficult to find a measure of the amount to be bought and sold more definite than the quantity that Millett could sell to the market it promised to endeavor to promote. Such promises as to quantity have been uniformly upheld by the California Courts and generally elsewhere." (p. 491)

It is appellees' position that the more recent and better reasoned decisions find these agreements sufficiently definite and certain; and, that this result is consonant with the needs of modern business.

We point out that, at page 34, Appellant's Brief, appellant quotes from Corbin on *Contracts,* Section 95, without citing a page number. In Corbin on *Contracts,* Section 95, beginning at page 395, and immediately following the language quoted on page 34 of Appellant's Brief appears the following:

> "Generalizations like the foregoing no doubt render some service in the administration of the law; but they may result in serious injustice unless they are applied with common sense in the light of much experience. Vagueness, indefiniteness, and uncertainty are matters of degree, with no absolute standard for comparison. It must be remembered that all modes of human expression are defective and inadequate. Every student of language knows this to be true of words. Every good dictionary shows that most important words have been given several, or even many, meanings; and these meanings themselves must be expressed in other words that are equally difficult of definition. Other modes of expression have like uncertainties; actions may, as the old adage avers, speak louder than words, but it is often not true that they express intention with greater definiteness and certainty. In every case, the function of the Court is to determine, as far as is possible, the intention of the contracting parties and to give equal effect thereto.
>
> In considering expressions of agreement, the Court must not hold the parties to some impossible, or ideal, or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty. In spite of its defects, language renders a practical service. In spite of ignorance as to

> the language they speak and write, with resulting error and misunderstanding, people must be held to the promises they make. The Court must not be overly fearful of error; it must not be pedantic or meticulous in interpretation of expressions."

We also note that in the pocket part supplement to Secs. 95 and 96, the editors of Corbin cite with approval *J. C. Millett Co.* v. *Park & Tilford Distillers Corp.,* supra.

At the risk of redundancy, we emphasize again that the appellees in this case are not seeking damages for loss of profits. If they were, we then would appreciate the difficulty (though not insurmountable) of integrating the contract and supplying all of the details which might affect the amount of profit to be realized by the appellees. What appellees are seeking in this case are "out-of-pocket" expenses, i.e. the amount expended in reliance on the appellant's promise, together with the damages to the individual appellee's credit and standing in the community.

4. Specification of Error No. 4

The contract of December 26, 1961, was neither (a) void for lack of mutuality nor (b) superseded by Exhibit "A" (R. 24-28).

(a) The agreement between appellant and Hank Wright's Sons, Inc., pleaded in Plaintiff's Contentions 13, 14 and 15 (R. 15-18) does not lack mutuality. The specific obligations of the parties are set forth and contracts similar to that pleaded have been upheld in *J. C. Millett Co.* v. *Park & Tilford,* 123 F. Supp. 484 (N.D.

Cal. S.D., 1954); *Hunt Foods* v. *Phillips,* 248 F.2d 23 (9 C.A., 1957) (which approves *Jack's Cookie Company* v. *Brooks,* 227 F.2d 935 (4th Cir., 1955)); *Des Moines Blue Ribbon Distributing Co., Inc.,* v. *Drewry's Ltd. U.S.A.,* 129 N.W.2d 731 (Iowa, 1964); *C. C. Hauff Hardware* v. *Long Mfg. Co.,* 136 N.W.2d 276 (Iowa, 1965).

We also note that *Corbin* (Corbin on Contracts, Vol. 1 A, Sec. 152) points out, at page 4, the confusion of thought resulting from confusing mutuality and consideration.

> ". . . There are now plenty of cases that clearly recognize the validity of a unilateral contract. Courts now often say clearly that it is consideration that is necessary, not mutuality of obligation." (Corbin on Contracts, Vol. 1 A, Sec. 152, p. 4)

(b) Appellant then argues (Appellant's Br. 45) that there was no mutuality because there was no consideration. It argues that, if the financing contract of December 26, 1961 was executed *after* Exhibit "A", there was no consideration since Hank Wright's Sons, Inc., was already obligated to appellant; and, on the other hand, if the financing agreement was executed *before* Exhibit "A", it was superseded because of, one, repugnancy (not pointed out); and, two, the "superseding clause" numbered 25 (R. 28).

This ignores the possibility that they were entered into simultaneously as a part of the same transaction. We think the evidence will show there was a two-day meeting in Seattle between certain of appellant's employees referred to in Plaintiff's Contention 1, and the

appellee Francis (Hank) Wright and one of his sons. It was at this meeting that the financing agreement referred to in Plaintiff's Contentions 13, 14 and 15 (R. 16-18) was reached.

After there had been the meeting of the minds and the agreement on financing, the parties then executed Exhibit "A" relating to only U. S. brand tires (the top line of appellant) (R. 24). It covered only one portion of the total agreement between the parties but did provide the specific terms of this phase of their agreement. Counsel also assumes that since paragraph 19 and 20 of Exhibit "A" (R. 27) set forth "among other things" certain obligations of the parties, that they are therefore the exclusive obligations of the parties. If this were correct, why did the printed forms state "among other things"?

It is respectfully submitted that Exhibit "A" was exactly what it says—an agreement relating to consignment of U.S. Tires and did not purport to contain or include all of the contract provisions between the parties. We think, therefore, it is immaterial whether the agreement mechanically was signed before, at the same time as, or after the financing agreement was concluded.

Furthermore, by the terms of paragraph 25 (R. 28), the agreement only superseded other agreements previously made on the subject of the "furnishing, selling or consignment of tire merchandise". It did not supersede agreements relating to financing. It was a printed form prepared by the appellant and should be construed against the appellant. Obviously, the superseding clause

was intended to vitiate previous printed forms or oral consignment agreements relating to tires.

See also, *Pace* v. *Jackson,* 155 Texas 179, 284 S.W.2d 340 (1955), affirming 275 S.W.2d 849, relating to mutuality and consideration, and *Merchants Bank of Canada* v. *Sims,* 122 Wash. 106, 209 Pac. 1113 (1922).

CONCLUSION

It is respectfully submitted that the arguments of appellant are all matters which are prematurely raised on a motion for a summary judgment with the possible exception of the point "b" urged under the first specification of error, namely, the question of whether or not Francis Wright individually may maintain this action for damages to his future standing in the community. This case should be remanded so that the disputed issues may be settled by the trier of the facts and this controversy which began in 1962 reach its ultimate conclusion.

The respondent corporation should be held to the same morals of the market place as any other enterpreneur and if it breached an agreement to finance the appellees Francis Wright and the predecessors in interest of the Trustee, it should bear the loss rather than Francis Wright or the creditors who relied on his credit and standing in the community in furnishing supplies, materials and merchandise for the ill-fated venture.

Respectfully submitted,

WALTER H. EVANS, JR.,
Attorney for Appellees

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER H. EVANS, JR.,
Attorney for Appellee